29 October 2014

TASC.COM

Via Email (tommy.thomas@gsa.gov)
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Subject: TASC, Inc. Response to Freedom of Information Act Request

Reference: TASC's OASIS Contracts (collectively, the "OASIS Contracts"):
(a) Contract No. GS00Q14OADU137 (Pool 1)
(b) Contract No. GS00Q14OADU336 (Pool 3)
(c) Contract No. GS00Q14OADU435 (Pool 4)
(d) Contract No. GS00Q14OADU519 (Pool 5A)
(e) Contract No. GS00Q14OADU620 (Pool 5B)
(f) Contract No. GS00Q14OADU733 (Pool 6)

Dear Mr. Thomas:

TASC, Inc. ("TASC") is in receipt of your 23 October 2014 email regarding Freedom of Information Act Case No. GSA-2015-000031 received by the General Services Administration ("GSA") seeking release of Section J.9 of each of the above-referenced OASIS Contracts (the "FOIA Request"). As you know, Section J.9 is the cost/price template, which contains:

(1) OASIS Labor Categories;
(2) Direct labor rates for each OASIS Labor Category;
(3) Facilities, Fringe, Overhead, and G&A rates (collectively, "Wrap Rate"); and
(4) Fee rate.

TASC appreciates the opportunity to explain its position on release of Section J.9 of its OASIS Contracts, and we agree with your initial assessment that this information is not properly releasable in response to the FOIA Request. Specifically, TASC takes the position that GSA should only release the OASIS Labor Categories and the range of direct labor rates for each OASIS labor category that were included in the OASIS Solicitation. TASC strongly objects to the release of its direct labor rates (which were selected from the range provided in the Solicitation), Wrap Rate and fee information and requests that these three categories of information be redacted prior to any public release of Section J.9 of any of TASC's OASIS Contracts. Specifically, release of these categories of information would cause TASC substantial competitive harm and, as such, this information is protected from disclosure under FOIA Exemptions (b)(3) and (b)(4).

I. TASC's financial information is protected from disclosure.

TASC's direct labor rates, Wrap Rate and fee information are properly subject to exemption from release under FOIA. Specifically, these types of financial and pricing information are proprietary, privileged and confidential and would cause substantial competitive harm to TASC if released. As such, they are protected from disclosure under FOIA Exemption 4 and also under the Trade

Secrets Act, 18 U.S.C. § 1905. In fact, these categories of information are protected by the plain language of FOIA Exemption 4 ***and*** by the test set forth in National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

The plain language of FOIA Exemption 4 protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Although early decisions of the D.C. Circuit construed Exemption 4 according to its plain language, National Parks struck out on a different course. In that case, which involved information required to be submitted pursuant to statute, the D.C. Circuit enunciated the now-familiar two-prong test for determining confidentiality for purposes of Exemption 4: whether dissemination of the information would likely impair the Government's ability to obtain necessary information in the future or cause substantial harm to the submitter's competitive position. 498 F.2d at 770. The D.C. Circuit's subsequent decision in Critical Mass clarified that the standard set forth in National Parks is confined to cases where "a FOIA request is made for financial or commercial information a person ***was obliged*** to furnish the Government." 975 F.2d at 880 (emphasis added). The information which TASC now seeks to protect from disclosure was not required to be submitted and, as such, is protected from disclosure under Critical Mass simply because it is TASC commercial and financial information that is customarily kept confidential by TASC. Moreover, this information would also be protected from disclosure even if it had been required to be submitted and thus is deemed subject to the test articulated in National Parks.

A. The Information at issue falls within the plain language of FOIA Exemption 4.

Exemption 4 to the FOIA protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential" from mandatory disclosure in response to a FOIA request. 5 U.S.C. § 552(b)(4). As Judge Randolph observed in his concurring opinion in Critical Mass II: National Parks "added—or as has been said, 'fabricated out of whole cloth'—an additional requirement that must be met before confidential information is exempt from disclosure." Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 931 F.2d 939, 947 (D.C. Cir. 1991), vacated by 942 F.2d 799 (D.C. Cir. 1991) (en banc) (Randolph, J., concurring) (quoting Note, Trade Secrets and the Fifth Amendment, 54 U. Chi. L. Rev. 334, 364 (1987)) (internal quotation marks omitted). Because the language of Exemption 4 is, in Judge Randolph's words, "rather straightforward," id., there was no need for the National Parks Court to create a heightened definition of confidentiality.

Nowhere in the statute itself is there support for an extraordinary confidentiality requirement. It is well-settled jurisprudence that when a statute is unambiguous, a court should simply apply that statute as written. Hubbard v. United States, 514 U.S. 695, 702–03 (1995); Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982); United States v. Lin, 101 F.3d 760, 765–66 (D.C. Cir. 1997).

National Parks is also at odds with the Supreme Court's construction of the FOIA exemptions, which indicate that when an exemption is unambiguous, there is no need to resort to legislative history to divine its meaning. See John Doe Agency v. John Doe Corp., 493 U.S. 146, 153–55 (1989) (construing Exemption 7). That is precisely what the National Parks Court chose to do—even though the legislative history fails to support the requirements of National Parks. As the Justice Department stated:

> Although Congress may have viewed the avoidance of potential competitive harm to the submitter or potential impairment of the government's access to information as two good reasons to make commercial and financial information exempt from disclosure under the FOIA, ***there is nothing to suggest that Congress intended to deny coverage under the exemption except where there is a particularized showing of certain specific harms***. Rather, Congress protected these interests by adopting a categorical exemption for all commercial or financial information submitted by persons outside the government where the information is privileged or kept closely held.

Government Brief on Rehearing En Banc in Critical Mass (hereinafter "DOJ Brief in Critical Mass") at 22 (emphasis added).

The legislative history bolsters the Justice Department's pre-1993 arguments in favor of a return to the plain meaning of Exemption 4. For example, the Senate Report stated:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained.

S. Rep. No. 89-813, at 9 (1965); accord H.R. Rep. No. 89-1497, at 10 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2427. Neither report provided any hint of creating a heightened meaning of "confidential."

The legislative history is full of statements evidencing a need to protect just the sort of information that is currently at issue: proprietary and confidential financial and pricing information submitted by businesses. For example, during hearings on Senate Bill 1666, which was a prior version of the FOIA never enacted into law, several concerns were raised about the lack of an exemption for trade secrets and commercial or financial information. See Nat'l Parks, 498 F.2d at 768. Subsequently, Exemption 4-type language was added to this bill, which then exempted "trade secrets and other information obtained from the public and customarily privileged or confidential." S. Rep. No. 88-1219, at 2 (1964). However, Congress adjourned before the House could pass the amended version.

During the next Congress, the legislation was reintroduced with a slightly altered exemption. The updated legislation removed the word "other" and replaced it with the words "commercial or financial" and also removed "customarily." ***The key point in this history is that throughout the legislative process, there were no changes made to the meaning of "confidentiality."*** That word retained the plain meaning that had been given it throughout the entire debate.

Although in Critical Mass the D.C. Circuit declined to overrule National Parks due to *stare decisis* considerations, the Supreme Court has since decided Citizens United v. FEC, 558 U.S. 310 (2010), in which such considerations were held insufficient to justify retaining a rule that Congress and corporations had relied upon for twenty years in passing campaign finance laws and structuring

their political donations. Arguably, Congress' reliance interests were stronger in Citizens United, where the Court disregarded those interests and overturned the 20-year old precedent, as *stare decisis* has "special force" when a co-equal branch of the Government has relied upon the Court's interpretation in developing a legislative scheme. Citizens United, 558 U.S. 411 (Stevens, J., dissenting in part). Of course, there is no reliance interest whatsoever in preserving the National Parks test, since those who submit information to the Government would be better—and more predictably—protected by the plain language test. National Parks is an egregious instance of expanding a statute beyond a reasonable interpretation, and the Government should return to the plain meaning of Exemption 4.

Applying the plain language of Exemption 4—"commercial or financial information obtained from a person and privileged or confidential"—to the information at issue leads to the conclusion that it should be withheld from release. As explained in further detail below, this information is clearly confidential commercial or financial information submitted by TASC.

B. The Information is within the test set forth in Critical Mass.

TASC has implemented detailed policies and procedures regarding protection of confidential and/or proprietary information and trade secrets. See **Attachment 3**, Graves Decl. TASC's direct labor rates, Wrap Rate, and fee information on the OASIS Contracts are precisely the types of information covered by TASC's internal policies and procedures. Graves Decl. ¶ 10. As further demonstrated in the attached declaration of Robert Dallen Jr., this information is of the type that TASC customarily keeps confidential, and its confidentiality has been carefully maintained throughout the entire course of the OASIS Contracts and all other TASC contracts. **Attachment 4**, Dallen Jr. Decl. ¶ 11–13. Accordingly, it is protected from disclosure under the Critical Mass test.

C. The information is also within the test set forth in National Parks.

Should GSA ultimately determine that the plain language of Exemption 4 and the Critical Mass test are inapposite to this case, the next inquiry would delve into the complex question of whether release of the information at issue would be likely either to cause TASC substantial competitive harm or to impair the Government's ability to obtain similar information in future GSA procurements. Nat'l Parks, 498 F.2d at 770.

(1) Competitive Harm.

The National Parks test protects information from dissemination "if it can be shown that public disclosure is ***likely*** to cause substantial harm to [the submitter's] competitive position." 498 F.2d at 770 (emphasis added). The D.C. Circuit has recognized that it is impossible to predict the future with any degree of certainty.[1]

[1] As the second National Parks decision explained, "[n]o actual adverse effect on competition need be shown, nor could it be, for the requested documents have not been released." Nat' Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 683 (D.C. Cir. 1976) ("National Parks II"); see also Gulf & W. Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979) ("[I]t is not necessary to show actual competitive harm"). Similarly, in the D.C. Circuit's first decision in Critical Mass, it spoke of the "necessarily uncertain prediction" to be made under the National Parks impairment prong. Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 830 F.2d 278, 286 (D.C. Cir. 1987), vacated by 975 F.2d 871 (D.C. Cir. 1992) (en banc).

The first component of the competitive harm prong of National Parks is to demonstrate the presence of actual competition. See Gulf & Western Indus., 615 F.2d at 530.[2] It is beyond dispute that there is fierce competition for federal contracts, including schedule orders under GSA's schedule contracts, which OASIS falls under. Because the information at issue here impacts every federal contract that TASC performs or bids on, TASC's competitive position would be harmed by release of the direct labor rates, Wrap Rate and fee information on the OASIS Contracts. Under the circumstances, release of the information at issue is very likely to cause substantial competitive harm to TASC.

If the information at issue here is released in connection with the referenced FOIA Request, TASC's competitive position would likely be substantially harmed on all of its current programs and bids. Release of TASC's direct labor rates, Wrap Rate and fee information from the OASIS Contracts would have a detrimental impact on TASC's ability to effectively compete in the ongoing procurements. Dallen Jr. Decl. ¶ 5–7. Release of this information would allow TASC's competitors to deconstruct our Wrap Rate, which would allow a significant competitive advantage on any future procurement where TASC is bidding. Dallen Jr. Decl. ¶ 8.

As a result, release of TASC's pricing information is particularly likely to cause substantial competitive harm. In McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999), the D.C. Circuit held that McDonnell Douglas's launch vehicle pricing information from its contract with NASA was protected from disclosure under Exemption 4. Id. at 306–7. The Court of Appeals specifically held that "the disputed line item price information is confidential commercial information under the National Parks test;" id. at 306, i.e., disclosure of the information was likely to cause substantial competitive harm to McDonnell Douglas. See also, e.g., Canadian Commercial Corp. v. Dep't of the Air Force, 514 F.3d 37, 40 (D.C. Cir. 2008) ("[I]t is the law of this circuit that line-item prices do come within Exemption 4."). This holding was based on the Court's agreement with McDonnell Douglas' contentions that the information could be used by competitors to help them underbid McDonnell Douglas. Id. at 307.

In McDonnell Douglas v. Dep't of the Air Force, 375 F.3d 1182 (D.C. Cir. 2004), McDonnell Douglas argued that "disclosure of the option prices in the contract likely will cause it substantial competitive harm because, in the event the Air Force does decide to rebid the contract, its competitors will be able to use that information to underbid it." Id. at 1188. The Air Force contended that price would play a relatively insignificant role in the re-bid, but McDonnell Douglas pointed out that "[b]ecause price is the only objective, or at least readily quantified, criterion among the. . . criteria for awarding government contracts, submitting the lowest price is surely the most straightforward way for a competitor to show its bid is superior." Id. at 1189. The D.C. Circuit therefore concluded that "disclosure of McDonnell Douglas's option year prices would likely cause McDonnell Douglas substantial competitive harm by informing the bids of its rivals in the event the contract is re-bid. Consequently, the option year prices fall within the scope of Exemption 4." Id. at 1190.

[2] Gulf & Western refused to allow disclosure of information that "would allow competitors to estimate, and undercut [the submitter's] bids." 615 F.2d at 530.

It is well-settled that pricing information is deemed confidential and subject to protection under FOIA exemption 4 if its release would allow competitors to predict a company's pricing strategy on future procurements—allowing competitors to underbid the company whose information was released. E.g., Boeing Co. v. Dep't of the Air Force, 616 F. Supp. 2d 40, 47 (D.D.C. 2009) (noting that, with respect to labor rates, FOIA exemption 4 applies when release would "threaten a company's competitive position to the extent [the released rates] can be used to predict future labor rates and thereby enable underbidding by a company's competitors."). That is precisely what would occur here if GSA releases TASC's direct labor rates, Wrap Rate and fee information on the OASIS Contracts. If released, any part of this information would cause substantial competitive harm to TASC as demonstrated herein.

(2) Impairment.

Disclosure of the types of information TASC is seeking to protect would likely impair the Government's ability to obtain the best proposals on future procurements. Although it is unlikely that GSA procurements would elicit no interest, the Government has a duty to procure the best goods and services at the most advantageous prices. This is far from assured when bidders fear that their confidential information will be disclosed to competitors. Thus, the information at issue also merits protection under the impairment prong of the National Parks test.

D. Applicability of FOIA Exemption 3 and the Procurement Integrity Act.

Finally, the information at issue is also protected by FOIA Exemption 3 and the Procurement Integrity Act. Specifically, FOIA exemption 3 protects "information specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). The Procurement Integrity Act prohibits disclosure of contractor bid or proposal information before the award of any contract "to which the information relates." 41 U.S.C. § 423(a)(1). The Federal Acquisition Regulation confirms that this prohibition covers not only the time period before award of an initial contract, but also the time period after that award if the information also relates to a pending or future procurement—as it does in this instance. See FAR 3.104-4(f)(3). As the attached declarations establish, the information TASC seeks to protect would be highly relevant to all of TASC's ongoing competitions.

Conclusion

We appreciate your detailed consideration of the preceding legal analysis and we hope this information will assist you in responding to the FOIA Request. In addition, we make the following procedural requests in connection with your consideration of these issues:

- We request an opportunity to review and address any materials or information of a background or factual nature that GSA may consider as favoring release of information that we are seeking to protect—if there are any—***before*** GSA makes any final decision in reliance upon such materials or information;

- We request an opportunity to meet with the administrative decision-maker(s) to explain our position and to address their questions or concerns, if any;

- We request an opportunity to provide further explanation of our objection (including submitting additional supporting declarations) regarding any specific items of information for which GSA disagrees with the objection; and

- We request that we be informed of GSA's determinations concerning release of this information. If and when GSA makes a final decision to disclose any information that we object to releasing, we request that you provide written notification of that decision at least ten working days before the intended release date, in order that we may seek judicial relief to prevent disclosure of such information.

Finally, please note that we object to the release of this letter in the event that it is subject to the above-referenced FOIA Request or any subsequent FOIA request. Should you have any questions, please contact the undersigned at (703) 449-3064 or by email at tiffany.faircloth@tasc.com.

Very truly yours,

Tiffany Faircloth
OASIS Contract Manager
TASC, Inc.

Attachments:
(1) Declaration of Sarah M. Graves
(2) Declaration of Robert Dallen Jr.